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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 242

KENOSHA MOTOR COACH LINES, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECISION AND DECREE APPEALED FROM AS REQUIRED BY UNITED STATES SUPREME COURT RULE 12.

Pursuant to the Provisions of Rule 12 of the Rules of the Supreme Court of the United States, the above named appellant files this, its separate statement, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment appealed from herein.

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The appellant in support of the jurisdiction of The Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

Nature of the Case

The case involves the validity of Section 196.81 Wisconsin Statutes as construed by the Supreme Court of Wisconsin, which provides in substance that no railroad shall abandon or discontinue any line or service thereon without prior approval of The Public Service Commission of Wisconsin. The appellant Kenosha Motor Coach Lines, Inc., operated an interurban electric railroad between points in Wisconsin and rendered service as a common carrier of property in both interstate and intrastate commerce under certificates of convenience and necessity issued by both The Interstate Commerce Commission and The Public Service Commission of Wisconsin, respectively.

By proper tariff filed with the Interstate Commerce Commission, that Commission permitted cancellation of all of the appellant's tariffs fixing rates for interstate transportation over appellant's line, after first suspending such proposed cancellations as authorized by the Interstate Commerce Act, and then, after hearing, permitting such cancellations to become effective, in which the Interstate Commerce Commission stated that it was its understanding that the cancellation of such tariffs constituted an abandonment of interstate service. When the cancellation became effective under the Interstate Commerce Commission rules on May 5, 1948, the appellant discontinued interstate freight service. The appellant continued, however, to render intrastate service under regulations in effect prior to commencement of its proceedings and under regulations wholly independent of those affecting interstate commerce.

On September 1, 1948 the Public Service Commission of Wisconsin in proceedings commenced after the Interstate

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Commerce Commission had permitted cancellation of interstate tariffs as above stated, ordered appellant to restore and thereafter render interstate freight service on its said electric interurban railway lines. Motion for rehearing having been denied, appellant Kenosha Motor Coach Lines, Inc., sought judicial review of such order under the provisions of the Wisconsin Statutes relating to review of orders of administrative agencies, in the Circuit Court of Dane County, Wisconsin. That court on November 12, 1948 directed that the order of The Public Service Commission of Wisconsin be vacated and set aside on the ground it had no jurisdiction of the subject matter. The Public Service Commission of Wisconsin thereupon appealed to The Supreme Court of The State of Wisconsin, which reversed such judgment on April 12, 1949 in a decision in which the court was divided four and three, and remanded the cause, with direction to affirm the Commission's order of September 1, 1948.

The decision respecting the state statute has thus been in favor of its validity.

Therefore, in accordance with the rules of The Supreme Court of The United States (Rule 46, Paragraph 2), the case is one in which, under legislation in force when the Act of January 31, 1928 (45 Stat. L. 541) was passed, to-wit, Under Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344), a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

"Section 196.81 Wisconsin Statutes 1947:

The Statutory Provisions Sustaining Jurisdiction

The statute supporting jurisdiction in this case is Section 237 (a) of the Federal Judicial Code (28 U. S. C. A. Section 344 (a)) which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could

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be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; *or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error* * * *." (Emphasis ours.)

Petitioner also relies upon Rule 46 of the Rules of the United States Supreme Court and particularly paragraph 2 thereof, which provides in part:

"Under the act of January 31, 1928, as amended by the Act of April 26, 1928, the review which theretofore could be had in this court on writ of error may now be obtained on appeal. * * *"

The Statute and Law of the State of Wisconsin, the Validity of Which Is Involved

The statute and law of the State of Wisconsin as construed and applied in this case, which is involved is as follows:

"Section 196.81 Wisconsin Statutes 1947:

"*Abandonment; commission approval required.* No public utility or railroad as defined in chapters 195 and 196 shall abandon or discontinue any line, branch line or extension or service thereon without first securing the approval of the commission. In granting its approval, the commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Any public utility or railroad abandoning or discontinuing in pursuance of authority granted by the commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the commission in that regard. Nothing herein contained, however, shall be construed to eliminate the necessity of obtain-

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ing the consent of the proper municipal authorities as required by section 193.11. The provisions of this section shall apply only so far as the constitution and laws of the United States permit."

Date of Judgment or Decree and Date of Application for Appeal

The date of the judgment and decision of the Supreme Court of the State of Wisconsin sought to be reviewed is April 12, 1949. A motion for rehearing made in due course was denied without opinion by order dated June 7, 1949.

The date upon which the application for appeal to the United States Supreme Court was presented is July 8, 1949.

Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied Upon

The case involves the validity of Section 196.81 Wisconsin Statutes hereinabove set forth. The majority opinion of the Wisconsin Supreme Court held that under that statute the Public Service Commission of Wisconsin had authority to enter its order of September 1, 1946 wherein it directed the appellant Kenosha Motor Coach Lines, Inc. to restore and thereafter render interstate freight service on its electric interurban railway lines.

The Wisconsin Supreme Court rejected the contentions of the appellant Kenosha Motor Coach Lines, Inc. that under such statute the Public Service Commission of Wisconsin had no jurisdiction to order the reestablishment or rendition of interstate freight service and that authority to regulate such interstate commerce was vested exclusively in the Interstate Commerce Commission.

The appellant Kenosha Motor Coach Lines, Inc. had contended that jurisdiction over the subject of the rendition of interstate freight service on such rail lines was vested exclusively in the Interstate Commerce Commission under

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Section 1 of the Interstate Commerce Act (49 U.S.C.A. 1).

The appellant had contended that Section 1 (1) of the Interstate Commerce Act clearly provided that the provisions of that section applied to the appellant as a carrier of property by railroad and that under Section 1 (18) Interstate Commerce Act, it as a carrier by railroad may not engage in interstate transportation of freight over its rail lines or abandon such transportation without the express consent and approval of the Interstate Commerce Commission.

The Public Service Commission of Wisconsin contended on the other hand that under Section 1 (22) of the Interstate Commerce Act which reads as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks located or to be located wholly within one state, or of street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation * * *."

the power of regulation of interurban electric railroad carriers was vested in the states in which such rail lines were located, and that the Interstate Commerce Commission did not have jurisdiction over the discontinuance of such service.

The appellant Kenosha Motor Coach Lines, Inc. asserted that Section 1 (18) of the Interstate Commerce Act requires Interstate Commerce Commission authority for a railroad carrier to (1) extend its line, (2) construct a new line, (3) acquire a line, (4) conduct operations or service over a line, (5) abandon a line, and (6) abandon operations or service over such line, and that Section 1 (22) of the Interstate Commerce Act which limits the authority of the Interstate Commerce Commission with respect to

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electric interurban railroads, deprives the Interstate Commerce Commission of jurisdiction only over physical construction and abandonment of such railroad lines, but leaves it invested with jurisdiction over the conduct of interstate service or operations. The Wisconsin Supreme Court rejected that position and held in effect that Section 1 (22) of the Interstate Commerce Act also divested the Interstate Commerce Commission of authority over the conduct or abandonment of operations or service in the nature of the transportation of interstate freight over the appellant's electric interurban railroad.

The Wisconsin Supreme Court ruled that the state statute therefore applied to the transportation of interstate freight over such railroad and that the Wisconsin Statute cited was therefore applicable and gave the Public Service Commission of Wisconsin jurisdiction over the same.

The appellant Kenosha Motor Coach Lines, Inc. pointed to the fact that Section 1 of the Interstate Commerce Act contains 22 subsections and that the exceptions respecting interurban electric railways above mentioned apply only to subsections (18) through (21) inclusive. The applicant, Kenosha Motor Coach Lines, Inc. contended that by Section 1 (4) of the Interstate Commerce Act it was its duty to furnish transportation upon reasonable request and establish reasonable through rates with other interstate carriers, including equitable division of such rates. That subsection (6) of said Section 1 requires the appellant as a rail carrier to establish just and reasonable classifications of property, to apply just and reasonable regulations and practices affecting classifications of rates or tariffs. That subsection (9) requires the appellant as a rail carrier to maintain and operate switch connections and construct switch connections upon the application of any shipper tendering interstate traffic for transportation. That sub-

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section (11) makes it the duty of the appellant as a rail carrier to furnish car service for interstate transportation and subsection (14) confers upon the Interstate Commerce Commission power to establish rules and practices respecting such car service, including both the compensation to be paid as well as the contract terms for the use thereof; that subsection (14) (b) provides that the appellant as a rail carrier of interstate traffic may not lawfully enter into contracts for the furnishing of protective service against heat or cold to property transported without Commission approval of such contract.

That subsection (15) confers unlimited powers of direction of actual operations of appellant as a rail carrier engaged in interstate transportation in the event of emergency.

The appellant, Kenosha Motor Coach Lines, Inc. further pointed out that other sections of the Interstate Commerce Act confer extensive jurisdictions in other respects upon the Interstate Commerce Commission over appellant as an interurban electric rail carrier.

That by Section 3 (5) of the Interstate Commerce Act the Interstate Commerce Commission has power to require the use of both terminals and tracks by one common carrier to another.

That by Section 6 of the Interstate Commerce Act the appellant is required to prepare rates for the transportation of interstate freight and classifications of freight and file the same with the Interstate Commerce Commission. That the same may not be changed except upon notice to the Interstate Commerce Commission, that the Interstate Commerce Commission has discretion to permit them to become effective within thirty days, that the Interstate Commerce Commission has power to prescribe the form and manner of filing and posting such rates, and has power to require

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vidence of concurrences in joint rates in which several nterstate carriers participate.

That Section 12 of the Interstate Commerce Act requires he Commission to enforce the provisions of the act.

That Section 15 of the Interstate Commerce Act confers upon the Interstate Commerce Commission the power to letermine the reasonableness of the rates of the appellant, Kenosha Motor Coach Lines, Inc. and to prescribe just and reasonable rates for the appellant.

Section 1 (18)-(21) of the Interstate Commerce Act defines the power of the Interstate Commerce Commission over service in interstate commerce and Section 1 (18) particularly specifies in great detail the comprehensive control that commission shall exercise over interstate commerce as hereinbefore detailed.

Section 1 (22) then specifies the only limitations upon the broad power of the Interstate Commerce Commission. In contrast to the broad powers delegated to that commission the limitations are carefully restricted by selecting only part of the words employed to vest the broad powers granted in previous sections. Thus in Section 1 (22) "construction or abandonment" only is referred to. On the other hand when power was granted in Section 1 (18), extension, construction, acquisition, operation, service, the abandonment of operation or service, abandonment of lines are all specifically referred to as being vested in the Interstate Commerce Commission. After the restriction in Section 1 (22) it is apparent, of course, that the physical abandonment or the actual construction of a wholly intrastate line was vested in the Interstate Commerce Commission regardless of the effect upon interstate commerce, with the exception made by Section 1 (22) "construction or abandonment" when related only to intrastate service remained within the concern of the state and only by adopting such a construction can there be an effective power in the Interstate Commerce Commis-

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sion in the respects in which the Federal government is actually interested.

The purpose of Congress to preempt the field of regulation of interstate commerce being expressly stated in the Act and clearly demonstrated by the comprehensive scope of its application the words of limitation must be construed to apply to such situations as do not affect interstate commerce.

That has been the approach of this court and of the lower federal courts in considering Section 1 (22). The decision of the Wisconsin Supreme Court is now in conflict with these decisions of the federal courts affecting the power of a federal agency, to-wit:

Texas v. *Eastern Texas R. Co.*, 258 U. S. 204;
Southern Railway v. *Reid*, 222 U. S. 424; and
Southern Railway Co. v. *Shealy*, 18 Fed. 2nd, 785 (D. C. E. Dist. So. Car.).

The purpose of this appeal is to continue the uniform application and construction of Section 1 (22) heretofore adopted and recognized by the federal court.

The dissenting opinion of Justice Rosenberry, Justice Fairchild and Justice Wickhem of the Wisconsin Supreme Court agreed with the contentions of the appellant that interstate freight service could only be rendered upon the filing of interstate freight rates with the Interstate Commerce Commission, and because such interstate rates are necessarily involved, the Interstate Commerce Commission has exclusive jurisdiction.

Upon the filing of the decision of the Wisconsin Supreme Court on April 12, 1949 the appellant, Kenosha Motor Coach Lines, Inc., as required by the rules of said court, promptly filed a motion for rehearing and asserted that if the order of the Public Service Commission of Wisconsin was to be affirmed as directed by the majority of the Wisconsin Su-

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preme Court that the same was in violation of the federal constitution for the reason that it makes no provision whereby the appellant Kenosha Motor Coach Lines, Inc. shall receive any compensation for the performance of such service, and for the further reason that the effect of such order is to deprive the appellant Kenosha Motor Coach Lines, Inc. of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. (Citing *Southern Railway Co.* v. *Shealy*, 18 Fed. 2nd, 784.)

The Supreme Court of the State of Wisconsin entered an order on June 7, 1949 denying the motion for rehearing but without indicating the reasons for its rulings against the contentions of the appellant, Kenosha Motor Coach Lines, Inc.

State of Proceedings and Manner in Which the Federal Questions Were Raised

The federal questions on which assignments of error have been made have been raised in each step of this litigation before the appropriate courts. The federal questions here involved were raised in the Circuit Court for Dane County, Wisconsin, when the original action for review was instituted by the appellant, Kenosha Motor Coach Lines, Inc. The same federal constitutional questions were again specifically raised in the Supreme Court of the State of Wisconsin in the briefs filed and arguments made before that court; which is the only method under Wisconsin procedure where such questions can be raised. The only exception is the question that the order of the Wisconsin Public Service Commission violates the Fourteenth Amendment of the Constitution of the United States. That question was not raised in the Wisconsin Supreme Court initially for the reason that the trial court, the Circuit Court for Dane County, Wisconsin, which reviewed the Commission's order

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held that the Commission had no power to enter the order in question and that the matters were exclusively within the jurisdiction of the Interstate Commerce Commission. It was only when the majority opinion of the Wisconsin Supreme Court on April 12, 1949 had determined that the order of the Public Service Commission of Wisconsin was validly entered under the Wisconsin Statute that the question of the effect of such order with respect to the Fourteenth Amendment of the Constitution of the United States came to issue. The question was then raised by this appellant, Kenosha Motor Coach Lines, Inc. on its motion for rehearing.

Manner in Which Questions Involved Were Passed On by the Court

The Circuit Court for Dane County, Wisconsin, granted the relief sought by the appellant, Kenosha Motor Coach Lines, Inc. and concluded that the Public Service Commission of Wisconsin was without authority to make the order it did on September 1, 1948, for the reason that such authority was exclusively within the jurisdiction of the Interstate Commerce Commission.

The Supreme Court of Wisconsin in a four to three decision reversed the Circuit Court of Dane County and directed the affirmance of the order of the Public Service Commission of Wisconsin dated September 1, 1948, holding that it had power to do so under Section 196.81 of the Wisconsin Statutes and that the Interstate Commerce Commission was divested of jurisdiction therein by virtue of Section 1 (22) of the Interstate Commerce Act.

Cases Sustaining the Jurisdiction of the Court

The decree of the Supreme Court of the State of Wisconsin herein appealed from is final:

North Carolina Railroad Co. v. *Story,* 268 U. S. 288, 69 L. Ed. 595;

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Tippecanoe County v. *Lucas*, 93 U. S. 108, 23 L. Ed. 822;
Bostwick v. *Brinkerhoff*, 106 U. S. 3, 27 L. Ed. 73.

The appellant cites the following cases believed to sustain jurisdiction:

Southern Railway Co. v. *Reid*, 222 U. S. 424;
Greenough v. *Tax Assessors*, 331 U. S. 486, 9 L. Ed. 1621;
Live Oak Water Users' Ass'n v. *Railroad Commission of California*, 269 U. S. 354, 70 L. Ed. 305;
Northern Pac. Railway Co. v. *Department of Public Works of Washington*, 268 U. S. 39, 69 L. Ed. 836;
Bluefield Water Works & Improvement Co. v. *Public Service Comm'n of West Virginia*, 262 U. S. 679, 67 L. Ed. 1176.

By reason of the decision of the Supreme Court of Wisconsin there is drawn in question the validity of the order of the Public Service Commission of that state and the validity of Section 196.81 Wisconsin Statutes, under the authority of which such order was entered, on the ground of its being repugnant to the constitution and laws of the United States. The decision of said Court was in favor of the validity of said order and said statute as construed by the Court.

There are *three* major Federal questions raised by the assignment of error, to-wit:

First. The Statute of Wisconsin (Sec. 196.81), as now finally construed by the Wisconsin Supreme Court conferring upon the Public Service Commission of that state, jurisdiction to order the appellant, Kenosha Motor Coach Lines, Inc. to restore and thereafter render interstate freight service on its interurban railway line, collides directly with the Interstate Commerce Act which vests exclusive regulation of interstate commerce in the Interstate Commerce Commission, and the power vested in the Federal

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government under the commerce clause of the Constitution of the United States.

Second. The order of the Public Service Commission of Wisconsin made pursuant to Sec. 196.81 Wisconsin Statutes violates appellant's rights under Article XIV, Section 1, Constitution of the United States, by compelling it to render interstate rail service without providing compensation therefor.

Third. The law as now construed by the Wisconsin Supreme Court, conflicts with the decisions of the federal courts which hold that jurisdiction to regulate such interstate commerce is exclusively vested in the Interstate Commerce Commission.

Excerpts from the Record Bringing the Case Within the Statute Conferring Jurisdiction upon the Supreme Court

There is no question in this case but that in these proceedings federal constitutional questions on which errors have been assigned were drawn in question on the ground that the state statute was repugnant to the several provisions of the constitution and laws of the United States, and that the decision of the highest court of the State of Wisconsin in which a decision in the suit could be made, was in favor of the validity of the statute.

The matter was first raised by the appellant, Kenosha Motor Coach Lines, Inc. in a hearing before the Public Service Commission of Wisconsin on the 10th day of June, 1948, wherein the appellant entered a special appearance in the following terms:

Page of Record in the Supreme Court of Wis. from Proceedings before the Public Service Commission of Wis. at Milwaukee, Wis., on June 10, 1948

A. "Commissioner Bryan: • • • The proceeding now before the Commission relates only to interstate commerce. 32 and 33

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"Mr. Coyne: With that understanding, Mr. Examiner, I now enter a special appearance on behalf of the defendant Kenosha Motor Coach Lines, Inc. objecting to the Commission proceeding with this hearing for the reason that it is our contention that this Commission has no jurisdiction to entertain evidence or to issue any order in respect to the providing or discontinuance of interstate freight or passenger service over this line. I shall further ask that the question of jurisdiction be tried by this Commission and be fully determined by this Commission by Commission order before the Commission proceeds with any hearing on the merits. * * *"

Typical of the method in which these matters were raised in the record are the following excerpts from the Petition for Review of the Order of the Public Service Commission of Wisconsin filed by the appellant in the Circuit Court of Dane County, Wisconsin:

Page of Record in the Supreme Court of Wisconsin

A. "* * * That petitioner (appellant) with the approval of the Interstate Commerce Commission has discontinued the rendition of interstate freight service upon said railway line, on May 5, 1948; that subsequently, the aforementioned proceeding was commenced by a group of shippers along said line upon complaint filed with respondent, Public Service Commission, naming petitioner (appellant) as defendant; that this petitioner appeared specially in said proceeding objecting to said Commission's jurisdiction of the subject matter and the parties, * * *." 1

B. "That the decisions and order of respondent Commission (Public Service Commission of Wisconsin) was affected by the following errors of law:

'(A) That said respondent Commission (Public Service Commission of Wisconsin) erred in making the conclusion of law that the Interstate Commerce Commission is without jurisdiction of the subject

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matter of discontinuance of interstate freight service upon said line, and that the respondent Commission (Public Service Commission of Wisconsin) was vested with such authority.' "

The federal questions were thereafter raised in the brief of the appellant filed with the Circuit Court of Dane County, Wisconsin:

	Page of Appellant's Brief in the Circuit Court for Dane County, Wisconsin
A. "The sole issue in this suit is whether the Public Service Commission of the state of Wisconsin is exceeding its authority under Section 196.81 by ordering the Kenosha Motor Coach Lines, Inc. to reinstate its interstate service after the Interstate Commerce Commission acting under authority of the Interstate Commerce Commission law authorized the petitioner to cancel its interstate rate filings, concurrences, etc. and thereby to cancel all interstate service."	1
B. "It is the contention of petitioner (Kenosha Motor Coach Lines, Inc.) that the constitution and laws of the United States do not permit the state administrative tribunal to affirmatively require a carrier to engage in an interstate operation."	2
C. "In the first place it is important to note that this paragraph (22) (referring to Section 1 (22) Interstate Commerce Act) in no way affects the powers conferred upon the Interstate Commerce Commission by the other paragraphs of the Act. As Justice Brandeis pointed out in the case of *Cleveland, etc., Railway v. U. S.*, 275 U. S. 404, 408,	2

'Paragraph 22 in no way affects the power conferred by paragraph 9. By its terms, it operates as a limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 to 21. These paragraphs relate to the construction, acquisition, extension and abandonment of a railroad.

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They deal primarily with rights sought to be exercised by the carrier.'

Admittedly, the Commission still has power and exercises exclusive jurisdiction over such questions as just and reasonable charges, classification of property, issuance of securities, etc., and as specifically declared by Section 1, paragraph 18 that the Interstate Commerce Commission shall have the control of 'construction or operation or construction and operation' of railroad lines. Thus, it is clear that even though the operation comes within paragraphs 18 to 21 of Section 1, or within the exemption of paragraph 22, the carrier is required to abide by the other provisions governing its interstate business and the Interstate Commerce Commission is vested with all powers of regulation."

D. "It is the petitioner's position, therefore, that the abandonment referred to in paragraph 22 of Section 1 of the Transportation Act refers to the 3
physical abandonment of the carrier's property which is local in character as distinguished from the discontinuance of service interstate in character."

E. "Fundamental in the issue presented here is the fact that the power of Congress over interstate commerce is plenary. The grant of the power to the 9
United States in itself negatives the power of the state thereafter to exercise this power or to supplement the functions performed by and delegated to the federal government. Therefore, as to purely interstate operations or transactions affecting commerce generally, even though Congress has not acted, it is clear as indicated in the preceding cases that the states may not interfere in such fields."

F. "The result is that the order is void because the Public Service Commission is without power over the subject matter by express denial of that power pro- 14

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vided in the act under which it purports to act and by reason of the superior power of the federal government."

The Federal questions were further raised in the brief of the appellant filed in the Supreme Court of the State of Wisconsin:

Issues Involved

	Page of Appellant's Brief in the Supreme Court of Wisconsin
A. "Does the Interstate Commerce Commission have jurisdiction under federal law to review or permit the abandonment of interstate freight service by Kenosha on its electric interurban railroad line? "Answered 'Yes' by the trial court."	2
"Did the Interstate Commerce Commission exercise jurisdiction under federal law to authorize abandonment of interstate freight service by Kenosha? "Answered 'Yes' by the trial court."	2
"Did the Wisconsin Public Service Commission have jurisdiction to order the resumption of interstate freight service by Kenosha? "Answered 'No' by the trial court."	2
B. "The Public Service Commission erred in holding that the Interstate Commerce Commission was without jurisdiction over abandonment and discontinuance of interstate freight service over the lines in question."	9
C. "The Interstate Commerce Commission has exclusive jurisdiction over the instant subject matter."	9
D. "It seems clear that Section 1 (22) refers to physical construction and physical abandonment of certain types of rail lines wholly within one state * * * but it placed control of the operation once a	16

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railroad was built in the Interstate Commerce Commission consistent with the general policy of the federal government."

E. "The Public Service Commission erred in holding that it had jurisdiction over the discontinuance of interstate freight service on the lines in question." 19

F. "The sole basis for the Public Service Commission's claiming that it had jurisdiction is by virtue of 196.81 of the Wisconsin Statutes. The statute nowhere contains any reference to regulation of interstate commerce." 19

G. "The Interstate Commerce Commission has conclusive jurisdiction on that subject except as to points specifically excepted. The service and rates applicable thereto definitely being under the jurisdiction of the Interstate Commerce Commission, we submit that the State Commission cannot usurp of these powers by virtue of the Wisconsin statutes." 22

The Federal question was further raised in the brief of the appellant filed in the Supreme Court of the State of Wisconsin in support of its motion for rehearing:

Page of Appellant's Brief in Supreme Court of Wisconsin on Motion for Rehearing

A. Issues involved.

"1. May the Wisconsin Public Service Commission order an interurban electric railway to perform the service of transportation of interstate freight? 2

"Answered 'Yes' by the majority of the court."

"2. May the Wisconsin Public Service Commission under the United States and Wisconsin

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constitutions order an interurban electric railway to transport property without compensation for such service?

"Not answered by the court."

B. "The Public Service Commission of Wisconsin possesses no jurisdiction or power to direct the performance of interstate transportation." 4

C. "The conclusion is inescapable that the Wisconsin Commission's order is not only one affecting interstate commerce; it is an attempt to directly regulate an instrumentality of interstate commerce in a field fully occupied by Congress and its delegate the Interstate Commerce Commission." 13

D. "Jurisdiction of the conduct of interstate transportation operations is vested exclusively in the Interstate Commerce Commission." 16

E. "The order of the Wisconsin Public Service Commission is in violation of the federal constitution and the Wisconsin constitution." 18

F. "The order of the Wisconsin Public Service Commission directs the Kenosha Motor Coach Lines, Inc., to restore interstate freight service over its railroad lines. It makes no provision whereby the Kenosha Motor Coach Lines shall receive any compensation for the performance of such service. The effect of such order is to deprive the Kenosha Motor Coach Lines, Inc., of its property without due process of law in violation of the Fourteenth Amendment of the United States Constitution." (citing *Southern Railway Co. v. Shealy*, 18 Fed. 2nd 784) 18

G. "The Kenosha Motor Coach Lines is compelled by the Wisconsin Commission's order to perform the service directed without provision for compensation for the same. Such an order violates the rights of Kenosha Motor Coach Lines under the constitutional provisions of both the United States and the State of Wisconsin in that it takes its property without compensation and without due process." 19

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Copies of Opinions on Rendition of Judgment

There are attached hereto the following copies of opinions delivered upon the rendering of judgment, including the opinions of the lower court:

1. Copy of memorandum decision of the Circuit Court for Dane County, Wisconsin.

2. Copy of Findings of Fact and Conclusions of Law of Circuit Court of Dane County, Wisconsin.

3. Judgment of the Circuit Court of Dane County, Wisconsin.

4. Opinion of the Supreme Court of the State of Wisconsin.

5. Dissenting Opinion of Chief Justice Rosenberry, Justice Fairchild and Justice Wickhem, concurring, of the Supreme Court of the State of Wisconsin.

6. Copy of decision of Wisconsin Supreme Court denying rehearing in the instant case.

Dated this 8th day of July, 1949.

Respectfully submitted,

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APPENDIX

Memorandum Decision of the Circuit Court for Dane County Wisconsin

(Caption and Venue Omitted)

Madison, Wisconsin, November 12, 1948.

Honorable Herman W. Sachtjen, Circuit Judge

By The Court:

The sole issue in this action to review is whether the Public Service Commission of the State of Wisconsin exceeded its authority and was without jurisdiction when it ordered the petitioner, Kenosha Motor Coach Lines, Inc., to restore and render interstate freight service on certain of its interurban railway lines within ten days from the date of the order.

The Commission bases its authority and jurisdiction under Sec. 196.81 of the Wisconsin Statutes which provides that "No public utility or railroad * * * shall abandon or discontinue any line, branch line or extension or service thereon without first securing the approval of the commission." * * * It asserts that the attempted abandonment of interstate service on the part of the petitioner was without such approval; that such approval was necessary because the lines of the petitioner involved were interurban electric railways, lying wholly within the state, and not operated as a part or parts of a general steam railway system of transportation; that the National Transportation Act, Sec. 1 (22) specifically exempts such railways from the jurisdiction of the Interstate Commerce Commission in respect to construction or abandonment and therefore the authority is lodged with the respondent and is not in contravention of any laws of the United States.

Sec. 1 (22) of the Transportation Act provides: "Construction, etc., of spurs, switches, etc. within State. The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of

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reet, suburban, or interurban electric railways, which are ot operated as a part or parts of a general steam railroad ystem of transportation."

It further maintains that the foregoing section has been nterpreted and construed by the Supreme Court of the nited States to the effect that authority is lodged with a tate commission over the abandonment of even interstate ervice, which is the question presented in the instant case.

Western & Atlantic R. v. Georgia Public Service Comm., 267 U. S., page 493; or 69 Law, Ed., page 753.

The position of the petitioner is briefly this—that the nterstate Commerce Commission has authorized the aban- onment of interstate service on the lines in question in con- ormity with the provisions of the Interstate Commerce Act; hat having so acted, the state has no authority to reinstate uch service because there can be no divided authority over nterstate commerce, (citing several cases in support of this osition); that Sec. 1(22) of the Transportation Act relied pon by the respondent applies only when there is a com- lete physical abandonment; that in the instant case there s no complete physical abandonment because it is still trans- orting passengers over the lines in question, which is the rincipal business, also intrastate freight; that the use and egulation of its lines so far as interstate commerce is con- erned is committed solely to the jurisdiction of the Inter- tate Commerce Commission.

Southern Ry. Co. v. Shealy, 18 Fed. 2d Series, page 784.

It is finally contended that a coordinate branch of the ndiciary of this state; namely, the Circuit Court of Mil- vaukee County, the Honorable Daniel W. Sullivan, presid- ng judge, has passed upon the same subject matter and ound in his decision that the Interstate Commerce Commis- ion had acted when they permitted the cancellation of the ariffs to go into effect; that Sec. 1(22) of the Transportation Act places control in the state of electric railways only so ar as the actual construction and the physical abandonment re concerned and that the use and regulation of the same s committed solely to the jurisdiction of the Interstate Commerce Commission; that since there was no complete

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physical abandonment of the lines, the state had no jurisdiction to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission regulating the use and operation of the lines and did vacate a temporary restraining order.

The first question to be passed upon is whether there has been an effective cancellation of petitioner's tariffs by the Interstate Commerce Commission. The respondent contends that such was not accomplished. If it were not accomplished, then why was the proceeding instituted against Judge Sullivan for injunctive relief? Clearly the proper proceeding would be for the shippers (the interveners in this action) to file a complaint with the Interstate Commerce Commission when the petitioners refused to accept interstate freight shipments after May 5, 1948. This court agrees with the finding of Judge Sullivan in that respect—that there was an effective cancellation of its tariffs on interstate freight effective May 5, 1948.

Respondent still contends that since there was a complete abandonment of interstate service, it had authority and jurisdiction to make its order, relying on the rule laid down in the Western & Atlantic R. v. Georgia Public Service Commission (supra) wherein the State Commission of Georgia ordered a restoration of service although eighty-five per cent of the business performed was interstate commerce. An examination of this case shows that there was a physical abandonment of the spur track both as to intrastate and interstate service without any authority of the Georgia Commission to do so. Likewise, there was no question of rates involved in that case and no authority from the Interstate Commerce Commission to permit the railway company to change its type of service. True, it was claimed that to compel such service would result in undue discrimination between shippers. In the last paragraph of this decision it was intimated by way of obiter dicta that had the Interstate Commerce Commission been approached, and had it decided that such service would be discriminatory, then the Georgia Commission would have no authority to make the order that it did.

In the instant case, the petitioner had gone to the Interstate Commerce Commission and had effectively cancelled

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ts rates, in conformity to the provisions of the Interstate Commerce Act. It is also agreed that the respondent has no jurisdiction over interstate rates and no power to compel the petitioner to file them, nor can the petitioner transport any interstate commerce without such rates being on file. Therefore, to permit the respondent to compel the petitioner to restore interstate service when the Interstate Commerce Commission had permitted it to discontinue such service would be a divided authority. It has long been recognized that the state has no such authority when such facts or conditions are presented.

Southern Ry. Co. v. Reid, 222 U. S., page 424.

Sec. 1(22) of the National Act does not give such authority over the lines in question, under the facts of the present case. We believe that Judge Sullivan, in his brief but well written decision, has given the correct interpretation of its application when he stated:

> • • • "Sec. 1(22) places control in the state only as to 'the construction or *abandonment'* of electric railways. The use and regulation of same in interstate commerce is committed solely to the jurisdiction of the Interstate Commerce Commission. *Southern Ry. Co. v. Shealy,* 18 F. (2d) 784; Southern Ry. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257."

Since there has been no physical abandonment of the lines in question, merely a termination or cancellation of its tariffs in interstate commerce, the state had no jurisdiction to make any order requiring the restoration of such service. If the interveners were aggrieved by the cancellation of these tariffs, their redress, if any, lay with the federal courts, not with the state.

We conclude, therefore, that the Public Service Commission was without authority when it made its order and was not permitted to do so by the laws of the United States as required by Sec. 196.81 of the Statutes. Therefore, the order of the Public Service Commission of the State of Wisconsin, under date of September 1, 1948, should be vacated and set aside.

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The attorneys for the petitioner may draw the proper findings and judgment in accordance with these directions and submit them to the opposing counsel before presenting them to this court for signature.

(Signed) HERMAN W. SACHTJEN,
Circuit Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF CIRCUIT COURT OF DANE COUNTY, WISCONSIN

(Caption and Venue Omitted)

Petition for review in the above matter having come on to be heard before this court on the 26th day of October, 1948 at ten o'clock in the forenoon, the Honorable Herman W. Sachtjen, judge thereof, presiding, the petitioner appearing by Stephens, Cannon & Cooper, by Frank M. Coyne, its attorneys and R. M. Rieser, of counsel, and the respondent appearing by its chief counsel, J. Ward Rector, and further appearances by interveners in support of the respondent's position being made by Drought & Grootemaat, and Quarles, Spence & Quarles, attorneys of Milwaukee, by T. H. Spence, and the court having heard oral argument in the matter and having considered briefs filed by the parties, and having reviewed and considered the entire record herein, and having been advised in the premises makes the following findings of fact and conclusions of law.

Findings of Fact

1. That on the 1st day of September, 1948 the Public Service Commission of Wisconsin entered an order in the case of J. G. Van Holten & Sons, Inc. et al, v. Kenosha Motor Coach Lines, Inc., Docket 2-SR-1929, wherein said commission ordered the petitioner herein, Kenosha Motor Coach Lines, Inc., to restore interstate freight service on certain of its electric rail lines between Waukesha, Milwaukee and Hales Corners, Wisconsin.

2. That said Public Service Commission of Wisconsin based its authority to enter such order on the authority vested in it by virtue of Section 196.81 of the Wisconsin Statutes requiring that no public utility shall abandon or

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discontinue any rail line or service without first securing authority from said Public Service Commission for such action; and based upon the further finding and conclusion by said commission that the Interstate Commerce Commission has no jurisdiction over abandonment or discontinuance of interstate service on said line by reason of said commission's interpretation of Sec. 1(22) Part I of the Interstate Commerce Act.

3. That the petitioner herein, Kenosha Motor Coach Lines, Inc., had, in conformity with the provisions of the Interstate Commerce Act, effectively cancelled its rates in respect to interstate freight on the lines in question effective May 5, 1948.

4. That Section 1, Paragraph (22) Part I of the Interstate Commerce Act places the control in the state regulatory bodies only as to the physical construction or physical abandonment of electric railways and that in the instant case there has been no physical abandonment of the line but merely a termination of interstate service on said line.

5. That the jurisdiction concerning use and regulation of said rail line insofar as interstate commerce is concerned is committed solely to that of the Interstate Commerce Commission.

Conclusions of Law

1. That the Public Service Commission of Wisconsin did not have jurisdiction of the instant subject matter in interstate commerce and by reason thereof had no authority to order the petitioner to restore interstate freight service on the rail lines involved herein.

2. That the order of the Public Service Commission of Wisconsin dated September 1, 1948 in the matter of J. G. Van Holten & Sons, Inc., et al., vs. Kenosha Motor Coach Lines, Inc., 2-SR-1929, which ordered the petitioner to restore interstate freight service on its lines should be vacated and set aside.

Let judgment be entered accordingly.

(Signed) HERMAN W. SACHTJEN,
Circuit Judge.

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Judgment of the Circuit Court of Dane County, Wisconsin

(Caption and Venue Omitted)

Petition for Review in the above matter came on to be heard before this court on the 26th day of October, 1948 at ten o'clock in the forenoon, the Honorable Herman W. Sachtjen, judge thereof, presiding, the petitioner appearing by Stephens, Cannon & Cooper, by Frank M. Coyne, its attorneys and R. M. Rieser, of counsel, and the respondent appearing by its chief counsel, J. Ward Rector, and further appearances by interveners in support of the respondent's position being made by Drought & Grootemaat, attorneys at law of Milwaukee, by Ralph J. Drought and Oliver M. Grootemaat, and Quarles, Spence & Quarles, attorneys of Milwaukee, by T. H. Spence, and the court having heard oral argument in the matter and having considered briefs filed by the parties, and having reviewed and considered the entire record herein, and having been advised in the premises and having made findings of fact and conclusions of law directing that judgment be entered vacating and setting aside the order of the Public Service Commission of Wisconsin from which review had been sought;

Now, on motion of Stephens, Cannon & Cooper, attorneys for the petitioner,

It Is Hereby Ordered and Adjudged that the order of the Public Service Commission of Wisconsin dated September 1, 1948 in the matter of J. G. Van Holten & Sons, Inc., et al., v. Kenosha Motor Coach Lines, Inc., Docket 2-SR-1929, wherein said Public Service Commission of Wisconsin ordered the respondent therein, Kenosha Motor Coach Lines, Inc., to restore interstate freight service on certain of its electric rail lines be, and the same hereby is, vacated and set aside.

Dated this 18th day of November, 1948.

By the Court,

Myrtle L. Hansen,
Clerk.

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IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1948

No. 188

KENOSHA MOTOR COACH LINES, INC., *Respondent,*

v.

PUBLIC SERVICE COMMISSION, *Appellant,*

J. G. VAN HOLTEN & SONS, INC. et al., *Intervenors*

Appeal from a judgment of the circuit court for Dane county: Herman W. Sachtjen, Circuit Judge. *Reversed.*

Action to review an order of the Public Service Commission dated September 1, 1948, directing Kenosha Motor Coach Lines, Inc. to restore interstate freight service on its lines of interurban railway between Milwaukee and Hales Corners, and between Milwaukee and Waukesha. The matter was heard before the court, and judgment vacating and setting aside the order of the Public Service Commission was entered November 18, 1948, from which judgment the Public Service Commission appeals.

Prior to September 10, 1947, Kenosha Motor Coach Lines, Inc. operated an electric interurban railway line extending between Milwaukee and Waukesha with a branch southward from West Junction to Hales Corners. It also operated an electric interurban from Milwaukee to Port Washington. It neither owned nor operated any railway properties outside of the state of Wisconsin, and it was not operated as a part or parts of a general steam railroad system of transportation. Its business was primarily the carrying of passengers in intrastate business. There was no interstate passenger business. It was also engaged as a common carrier of freight, both intrastate and interstate. Since its lines were located entirely within the state of Wisconsin, the interstate service was rendered through transfer of carload shipments, using interstate steam railroads operating into the city of Milwaukee.

Prior to September 10, 1947, the carrier had filed with the Interstate Commerce Commission its rates applicable to

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shipments between points on its line and points served by it outside the state through connections with the lines of other carriers. On September 10, 1947, it filed with the Interstate Commerce Commission certain documents purporting to cancel all interstate freight tariffs to which it was then a party. The cancellations were to become effective on November 15, 1947. Following the receipt of the cancellations the director of the Interstate Commerce Commission wrote to the carrier that the effect of said cancellations would be to abandon the operation of its lines as to interstate commerce and that, if it was its purpose to discontinue operation of the lines as to interstate commerce, an appropriate application should be filed as provided by the regulations of the commission.

On October 9, 1947, the Interstate Commerce Commission suspended the cancellation of the tariffs pending an investigation. On January 19, 1948, the carrier filed with the Interstate Commerce Commission an application under the provisions of the Interstate Commerce Act to abandon interstate freight service. At the same time it filed an application for a vacation of the commission's order of October 9, 1947, suspending the cancellation of interstate freight tariffs. In its application to abandon interstate freight service the carrier did not concede the jurisdiction of the Interstate Commerce Commission to grant or deny authority to abandon, but in both applications it insisted that by reason of the provisions of Sec. 1 (22) of the Interstate Commerce Act the commission was without jurisdiction to pass upon its proposed abandonment of interstate freight service.

On February 27, 1948, the Interstate Commerce Commission dismissed the application of January 19 to abandon interstate freight service on the ground that it had no jurisdiction. On March 12, 1948, without a recitation of its reasons, the commission vacated its suspension order of October 9 and dismissed the inquiries which it had instituted into the lawfulness of the tariff cancellations.

Following the dismissal of these proceedings certain shippers who were being served by Kenosha Motor Coach Lines, Inc. wrote to the Wisconsin Public Service Commission and asked it to take jurisdiction. Without formal application or hearing, and without formal action by the Public Service

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Commission, a letter was written to the shippers stating that the matter should be referred to the Interstate Commerce Commission. Thereupon the shippers commenced an action in the circuit court for Milwaukee county to restrain the carrier from discontinuing interstate freight service on the Milwaukee-Waukesha-Hales Corners lines. After hearing before the court, the action was dismissed. The plaintiffs appealed to this court but did not bring the appeal on for hearing.

The carrier abandoned interstate freight service on May 5, 1948. Interested shippers upon the lines then made application to the Wisconsin Public Service Commission and, after hearing, The Wisconsin commission, on September 1, 1948, issued an order requiring Kenosha to restore the interstate freight service which it had abandoned. An application for rehearing being denied, on October 4, 1948, the Kenosha Motor Coach Lines, Inc. instituted a proceeding in the circuit court for Dane county to review the Wisconsin Commission's order of September 1. That court vacated and set aside the order of September 1.

BROADFOOT, *J.*:

The questions raised by this appeal are as follows: (1) Did the Wisconsin Public Service Commission exceed its authority and was it without jurisdiction when it ordered the respondent to restore the interstate freight service which it had abandoned? (2) Was the judgment of the circuit court for Milwaukee county res judicata of the power of the Wisconsin Public Service Commission in this proceeding?

As to the first question the appellant contends that by virtue of sec. 196.81, Stats. it has jurisdiction. That section reads as follows:

> "No public utility or railroad as defined in chapters 195 and 196 shall abandon or discontinue any line, branch line or extension or service thereon without first securing the approval of the commission. In granting its approval, the commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Any

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> public utility or railroad abandoning or discontinuing in pursuance of authority granted by the commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the commission in that regard. Nothing herein contained, however, shall be construed to eliminate the necessity of obtaining the consent of the proper municipal authorities as required by section 193.11. The provisions of this section shall apply only so far as the constitution and laws of the United States permit."

It further contends that the Interstate Commerce Commission has no jurisdiction here because the business of the respondent is excluded from the provisions of the Interstate Commerce Act by sec. 1 (22) thereof, which reads as follows:

> "The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The respondent, on the other hand, contends that the Interstate Commerce Commission has exclusive jurisdiction of the interstate freight service of the respondent and that the exclusion referred to above is only applicable when there is to be physical construction of a new line or the physical abandonment of an existing line, and that it does not cover the abandonment of operation or service.

The respondent further contends that the Interstate Commerce Commission exercised jurisdiction and in effect consented to the abandonment of the interstate freight service by dismissing the application for abandonment and the commission's own order suspending cancellation of respondent's tariffs.

There is no doubt that our dual system of state regulation and of federal regulation is confusing. Persons subject to such regulations are often confused by the multiplicity of, and sometimes conflicting, regulations of the state and

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federal agencies charged with the enforcement of the regulations. That is unfortunate. The situation is analagous to the dual regulation of employment relations under the enactments of the state and of the federal government. This question has been carefully reviewed in the case of *Wisconsin Labor Relations Board v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673. The following quotations from that opinion with the authorities there cited clearly state the rule:

> "The power of the state of Wisconsin to subject labor relations to regulation is based upon the police power; that of the federal government to deal with the same subject is grounded upon and limited by the commerce clause, and is sustained upon the theory that strikes, boycotts, and other disturbances arising from labor disputes in industries engaged in interstate commerce so proximately obstruct and burden interstate commerce as to bring labor relations in such industries within the power of congress. * * *"
>
> "The state may, therefore, regulate labor relations in the interests of the peace, health, and order of the state, and the federal government may regulate this relationship to the extent that unregulated it tends to obstruct or burden interstate commerce. Obviously, a possibility of conflict between these powers exists only as to the portion of the field with which congress has competency to deal. In the absence of a federal statute either dealing with or pre-empting this field, the police power of the state has full operation, provided no undue or discriminatory burdens are put upon interstate commerce."
>
> "* * * when congress has pre-empted the field, the power of the state with respect to interstate commerce terminates: * * *"
>
> "It is not seriously contended that the Wisconsin act, which is conceded to be nearly identical both in purpose and method with the national act, discriminates against or unduly burdens interstate commerce. The conclusion is inevitable that it constituted a valid exercise of the police power of this state, even as to those labor relationships which fall within the commerce

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clause, unless the national act has excluded its operation in this field. That congress, if it clearly evidences such an intention may, with respect to matters falling within its powers under the commerce clause, completely exclude the operation of existing or subsequently-enacted state statutes which in the exercise of the police power purport to regulate this field, is not open to question. * * *"

"It is equally well established, however, that the intention of congress to exclude states from exercising their police power must be clearly manifested. * * *"

Applying the rule stated in the *Rueping case*, it is apparent that the appellant has jurisdiction unless the federal government has pre-empted the field. The respondent is a Wisconsin corporation, it is a common carrier, and it is operating under a franchise from the state of Wisconsin. "It is well settled, however, that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and in the absence of specific action by the commission or by congress itself, interfere with the authority of the states to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce is thereby incidentally affected, so long as it is not directly burdened or interfered with." 9 Am. Jur. (Carriers) p. 454, sec. 44.

A reading of the Interstate Commerce Act indicates that "interurban electric railways, which are not operated as part or parts of a general steam railroad system of transportation" were considered in a special class and were accorded special treatment. In at least three sections of the act they were given some exemption. In addition to par. (22) of sec. 1 they were also accorded special treatment in par. (1) of sec. 15a and in par. (1) of sec. 20a. *United States v. Chicago, North Shore Railroad Co.*, 288 U. S. 1. Congress has not manifested a clear intention to pre-empt the field. The Interstate Commerce Commission itself has not only failed to act in the matter but has stated that in its opinion it is without jurisdiction. We do not hold that the Interstate Commerce Commission has no jurisdiction,

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nor do we concede that it has exclusive jurisdiction. In the case of *Western & Atlantic Railroad v. Georgia Public Service Commission*, 267 U. S. 493, the United States supreme court has also recognized that the federal government has not pre-empted the field nor does the Interstate Commerce Commission have exclusive jurisdiction in all matters affecting interstate commerce.

The order of appellant is not discriminatory, it places no undue burden upon interstate commerce, and it does not interfere in any way with interstate commerce. It was justified in entering its order now under review.

The contention of the respondent that the Interstate Commerce Commission assumed jurisdiction by its orders of February 27, 1948, and March 12, 1948, is without merit. Both orders were based upon the belief of that commission that it was without jurisdiction because of the provisions of sec. 1 (22) of the Interstate Commerce Act.

The second question must be answered in the negative. The case before the circuit court for Milwaukee county was an action in equity to restrain the carrier from discontinuing its interstate freight service. There had been no prior order by the state commission, and the appellant was not a party to the action. The circuit judge correctly held that it was without jurisdiction to issue an injunction upon the record presented to it.

By the Court:—Judgment reversed, and cause remanded with directions to affirm the order of the Wisconsin Public Service Commission dated September 1, 1948.

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IN SUPREME COURT, STATE OF WISCONSIN,
AUGUST TERM, 1948

No. 188

KENOSHA MOTOR COACH LINES, INC., *Respondent*,

v.

PUBLIC SERVICE COMM., *Appellant*;
J. G. VAN HOLTEN & SONS, INC., ET AL., *Intervenors*

ROSENBERRY, *C. J.* (dissenting):

The order of the Commission requires the plaintiff to "restore and thereafter render interstate freight service on its lines of interurban railway between Milwaukee and Hales Corners and between Milwaukee and Waukesha, respectively." It is my understanding an interstate freight service can only be rendered upon the filing of interstate freight rates with the Interstate Commerce Commission service to be rendered pending the approval by the Interstate Commerce Commission. Because interstate rates are necessarily involved the Interstate Commerce Commission has exclusive jurisdiction and the so-called exclusion clauses of the Interstate Commerce Act do not apply. Interstate service does not relate to "freight service" which is performed between termini wholly within a state.

I am therefore of the view that nothing is involved in this case but interstate rates, because interstate freight service can only be rendered on an interstate freight rate. This leads to the conclusion that the Public Service Commission has no jurisdiction to enter the order in question.

The fact that the Interstate Commerce Commission held it had no jurisdiction is not conclusive and the matter should have been brought before the federal courts for a final determination. I am therefore of the opinion that the judgment appealed from should be affirmed.

I am authorized to say that Mr. Justice Fairchild and Mr. Justice Wickhem concur in this dissent.

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IN SUPREME COURT, STATE OF WISCONSIN,
AUGUST TERM, 1948

MOTIONS FOR REHEARING

June 7, 1949.

Motion for Rehearing Denied With $25.00 Costs

No. 188

KENOSHA MOTOR COACH LINES, INC., *Respondents,*

v.

PUBLIC SERVICE COMMISSION, *Appellant*

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